DR LEELA RATOS & ORS.

v.

ANTHONY RATOS DOMINGOS RATOS & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[PETITION NO: D5-26-5-1996]
2 JULY 1996

CIVIL PROCEDURE: *Preliminary issue - Rules of the High Court 1980, O. 33 r. 2 and O. 18 r. 19 - When will court try preliminary issue - Whether substantial saving of time and expenditure as a whole - Interrelated transactions and averment of facts - Whether whole series of facts will have to be considered*

CIVIL PROCEDURE: *Preliminary issue - Application under O. 18 r. 19 or O. 33 r. 2 of Rules of the High Court 1980 - Whether Orders pursuable in the alternative only - Whether another party in the same petition can apply under alternative Order - Whether each party is free to choose the Order under which he intends to proceed*

CIVIL PROCEDURE: *Locus standi - Beneficial shareholder - Whether may petition under s. 181 of Companies Act 1965 - Whether petitioner a beneficial owner of shares*

COMPANY LAW: *Winding-up - Petition - Beneficial shareholder - Locus standi - Companies Act 1965, s. 181 - Whether s. 181 excludes beneficial shareholders from petitioning under it*

CIVIL PROCEDURE: *Injunction - Injunction restraining respondent from interfering in affairs of company - Whether a blanket restraint - Whether respondent restrained from defending action - Whether restrained from challenging petitioner's locus to file petition - Whether restrained from challenging the injunction and the substantive proceedings - Whether restrained from making application under O. 33 r. 2 of Rules of the High Court 1980*

The six petitioners herein had earlier filed a petition ('the petition') pursuant to s. 181 of the Companies Act 1965 ('the CA') against the respondents. Thereafter, the petitioners obtained an interlocutory injunction ('the injunction') restraining the 1st respondent from interfering in the affairs of the 5th respondent company ('the company'). The 1st petitioner is the wife of the 1st respondent while the 2nd to the 6th petitioners are their children.

Subsequently, the 1st respondent filed the instant application under O. 33 r. 2 of the Rules of the High Court 1980 ('the RHC') praying for trial of a

preliminary issue, ie: whether, in respect of the company, the petitioners are entitled to petition the Court under s. 181 of the CA. The 1st respondent submitted that the petitioners have never been shareholders of the company and, thus, have no *locus standi* to petition under s. 181 of the CA. It was further submitted that the question of *locus standi* should be determined as a preliminary issue, and that the trial of the preliminary issue would save time and expense.

The petitioners contended that the instant application should be dismissed following the injunction which prohibits the 1st respondent from interfering in the affairs of the company. Further, it was submitted that the company had filed an application under O. 18 r. 19 of the RHC to strike out the petition on the basis of *locus standi*, and, therefore, the 1st respondent himself had no *locus standi* to file the instant application. It was argued that there could be no two different applications filed on the basis of *locus standi* as O. 18 r. 19 and O. 33 r. 2 of the RHC could only be invoked in the alternative. The 1st petitioner also maintained that she is the beneficial owner of 51,000 shares ('the shares') in the company, which shares are being held in trust for her by the 2nd respondent.

Held:

[1] The petitioners' submission - that the 1st respondent has been restrained by the terms of the injunction from filing the instant application - was without merit. The injunction could not have been meant to disable the 1st respondent from taking the necessary steps in protecting his interests. It is the duty of the 1st respondent to defend the action and to take all the necessary steps in his defence, including challenging the petitioners' *locus* to file the petition. It would be draconian and an infringement of natural justice to suggest, that whenever an applicant obtains an injunction preventing a respondent from interfering in the affairs of a company, then that respondent is also restrained from challenging the injunction as well as the substantive proceedings.

[2] The case of *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors. v. Sey Hoe Sdn. Bhd. & Ors.* is the authority for the proposition that applications under O. 18 r. 19 or O. 33 r. 2 of the RHC can only be made in the alternative; ie, whenever a litigant wishes to challenge the *locus* of another, he has two alternatives, either to proceed under O. 18 r. 19 or, O. 33 r. 2 of the RHC. It did not lay down that if a respondent has brought an application under O. 18 r. 19 of the RHC then another respondent in the same petition cannot bring an application under O. 33 r. 2 of the RHC. Each respondent is free to choose the order under which he intends to proceed.

[3a] The 1st petitioner is, indeed, the beneficial owner of the shares. Furthermore, she has made the 2nd respondent a party to the proceedings.

[3b] Section 181 of the CA does not exclude beneficial shareholders from petitioning under it. It could not have been the intention of Parliament to deprive a beneficial shareholder from bringing an action where a director of a company is exercising the powers of the directors and conducting the affairs of the company in a manner oppressive to the shareholders whilst the trustee of the shares does not take any action to safeguard the beneficial interest of the *cestui que trust*.

[4a] As a general rule, the Court will not exercise its power under O. 33 r. 2 of the RHC to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole.

[4b] All the allegations made against the 1st respondent arose from a series of transactions and averment of facts in relation to the 4th, 5th, 6th, and 7th respondents. Furthermore, the subject-matter is so interrelated that it will be wrong for the Court to exercise its discretion to allow the instant application. The petition involves a series of transactions which are so interrelated that the whole series of facts will have to be considered.

[First respondent's application dismissed]

Cases referred to:

S.I. Rajah & Anor. v. Dato' Mak Hon Kam & 11 Ors. (No. 1) [1994] 1 CLJ 207 ***(dist)***
Lever v. Land Securities Company Ltd [1894] Law Times 323 ***(cit)***
Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors. [1995] 1 CLJ 461 ***(refd)***
Prudential Assurance Co. Ltd. v. Newman Industries Ltd and Others (No. 2) [1982] 1 AER 304; [1995] 1 CLJ 461 ***(dist)***
Harmer v. Amrstrong [1934] 1 Ch D 65 ***(foll)***
Performing Right Society Ld. v. London Theatre of Varieties Ld [1924] AC 1 ***(foll)***
Federal Insurance Co. v. Nakano Singapore Pte Ltd [1992] 1 SLR 390 ***(refd)***
Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock Urban District Council [1968] Ch D 605 ***(foll)***

Legislation referred to:

Companies Act 1955, s. 181
Rules of the High Court 1980, O. 18 r. 19, O. 33 r. 2
Rules of the Supreme Court [UK], O. XXV r. 2

For the petitioners - Saraswathy (R.S. Sodhi with her); M/s. N. Saraswathy Devi
For the 1st respondent - D.P. Naban (K.A. Gan & Evelyn Khoo with him); M/s. Azman, Davidson & Co.

JUDGMENT

Kamalanathan Ratnam JC:

The petitioners herein had filed this petition against the abovenamed ten respondents. The 1st petitioner is the wife of the 1st respondent and the 2nd to the 6th petitioners are the 1st petitioner's children. The 1st respondent filed Encl. 11 which was an application pursuant to O. 33 r. 2 of the Rules of the High Court 1980 (RHC) that certain preliminary issues be tried before all the other issues in the petition. With the consent of the petitioners' solicitors the 1st respondent had amended Encl. 11 and narrowed down the preliminary issues to only one, i.e.:

> In relation to the 5th respondent company namely BIOPOWER SDN BHD, whether the petitioners are entitled to petition this Court under s. 181 of the Companies Act 1965 (the Act)

It was the submission of the 1st respondent that the petitioners are not and have never been shareholders of the 5th respondent company and thus have no locus to petition under s. 181 of the Act and thus the 1st respondent prayed to be allowed to try this preliminary issue.

Section 181 provides that the following people have locus to seek a remedy under the said section:

- any member or holder of a debenture of a company;
- in the case of a declared company under Part IX, the Minister, may apply to the Court for an order.

The 1st respondent thus submitted that Encl. 11 should be allowed for either of the two alternative reasons:

(1) That the trial of the preliminary issue would save time and expense

(2) The question of *locus standi* should be determined as a preliminary issue.

In respect of the first ground, the 1st respondent relied on *S.I. Rajah & Anor. v. Dato Mak Hon Kam & 11 Ors. (No. 1)* [1994] 1 CLJ 207. There the defendants applied for trial of a preliminary issue, ie whether the plaintiff is entitled to seek the relief sought. The defendants submitted that the 1st plaintiff being a bankrupt had no *locus* to do so. The Court allowed the defendants' application to try the said preliminary issue. Lim Beng Choon J said at p. 212:

> As a general rule, the Court will exercise its power under O. 33 r. 2 to order a preliminary question to be tried if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.

The 1st respondent also relied on *Lever v. Land Securities Company Ltd*. [1894] Law Times 323, 325 where the Court of Appeal said that the object of the Rules of the Supreme Court (UK), O. XXV r. 2 (equivalent to our O. 33 r. 2 RHC).

> is to prevent unnecessary expense in any form or any shape

It was submitted that since the petitioners were not shareholders of the 5th respondent, they lacked the *locus* to seek a remedy against the 5th respondent and thus the 1st respondent ought to be allowed to raise this as a preliminary issue.

Whether the Question of Locus Standi Ought to Be Determined as a Preliminary Issue

The 1st respondent relied heavily upon the Supreme Court decision of *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors. v. Sey Hoe Sdn. Bhd. & 2 Ors.* [1995] 1 CLJ 461 and submitted that where the *locus standi* of a party is challenged the correct procedure is to bring such a challenge **before** trial (emphasis provided) either by way of an application under O. 18 r. 19 or O. 33 r. 2 RHC. At p. 569 Mohd Jemuri Serjan CJ (Borneo) said:

> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court, 1980 because if they succeed in their applications on any of these Orders the civil suit and injunction itself would both collapse.

The respondents also relied on *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. and Others (No. 2)* [1982] 1 AER 304 where the plaintiff sought to bring a derivative action on behalf of the company. The defendants then applied for determination as a preliminary issue, the question whether the plaintiff was entitled to maintain such a claim. The Court of Appeal held that the learned Judge:

> ...ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action.

It was therefore urged upon me to allow this application.

In response the petitioners submitted that this application ought to be rejected on the basis of the interlocutory injunction granted on 23 February 1996 whereby the 1st respondent was restrained from interfering in the affairs of the 5th respondent company in any manner whatsoever. Accordingly, it was submitted that the 1st respondent was prohibited from making this application which concerned the 5th respondent. It was further pointed out to me that

since the 5th respondent are being represented by M/s. Othman Hashim & Co who have filed a similar application under O. 18 r. 19 (Encl. 29) seeking to strike out the petition, also on the basis of *locus standi,* the 1st respondent therefore himself has no *locus standi* to file this application. A further submission of the petitioners was that based on the decision in *Alor Janggus* there can be no two different applications filed on the basis of *locus standi* in that the provisions of O. 18 r. 19 and O. 33 r. 2 could only be invoked in the alternative. As such it was urged upon me that this application (Encl. 11) by the 1st respondent was in conflict with Encl. 29 filed by the 5th respondent and therefore Encl. 11 ought to be dismissed with costs.

In response to the argument that since the petitioners have never been the shareholders of the 5th respondent they therefore have no *locus standi* to file the petition, the 1st petitioner pointed out that she was the beneficial shareholder of 51,000 shares in the 5th respondent company. In the petition is exhibited the list of shareholders of the 5th respondent company showing one Tuan Haji Zainal Abidin Haji Mohd Ali as holding 51,000 shares. Also exhibited in the said petition is a trust deed stating that the said 51,000 shares were fully paid for by the 1st petitioner and that the said shares were held in trust for the 1st petitioner by Tuan Haji Zainal Abidin Haji Mohd Ali. It was thus submitted by the petitioners that since s. 181 of the Act provides a remedy for shareholders generally where they are oppressed and deprived of their rights the 1st petitioner has every right to seek a remedy against the 5th respondent under this section.

As to the question of saving of time and expenditure the petitioners argued that whichever way the Court decided on the preliminary issue, the petition would still have to be heard and disposed of because the petition is filed primarily against the 1st respondent in that it is alleged that the 1st respondent had caused the affairs of the 4th, 5th, 6th and 7th respondents to be conducted and the powers of the directors to be exercised in a manner oppressive to the petitioners. The petitioners contend that if the preliminary issue is tried, the petitioners will have to refer to the whole petition as the transactions and the subject matter are all inter-related as the companies involved, i.e. the 4th, 5th, 6th and 7th respondents belong to a family group where the 1st respondent has acted as the director. As such it was submitted this application ought to be dismissed.

Does the Interlocutory Injunction Restrain the 1st Respondent from Filing this Application

In all proceedings when an action has been filed against a defendant or a respondent, as in this case, and where the respondent does not accept liability, it becomes the duty of the respondent to defend the action and to take all necessary steps in his defence. And this includes challenging the plaintiff/petitioner's *locus* to file the said proceedings. The submission of the petitioners

that the 1st respondent has been restrained by the terms of the interlocutory injunction from filing this application is without merit. If such an argument is acceptable then the 1st respondent cannot take any steps at all in these proceedings. He cannot defend the injunction proceedings or the petition itself because that would be tantamount to interfering in the affairs of the respondents.

I hold that this cannot be the intention of the injunctive order dated 23 February 1996. The said order which I granted could not have meant to disable the 1st respondent from taking such necessary steps as he was advised in order to protect his interest. If such was the effect of the order as suggested by Counsel for the petitioners, then whenever an applicant obtained an injunction to prevent a respondent from interfering in the affairs of a company, that respondent would also be restrained from challenging the injunction or the substantive proceedings. Such a draconian step is an infringement of natural justice and must be rejected.

As to the petitioners' reliance upon the *Alor Janggus* case whereby he submitted that since the 5th respondent had already filed an application under O. 181 r. 19 of the RHC and therefore the 1st respondent ought not to be allowed to file this application under O. 33 r. 2 of the RHC, I am of the view that the *Alor Janggus* case is authority for the proposition that an application under O. 18 r. 19 and O. 33 r. 2 of the RHC can only be made in the alternative. However, it is not authority for the proposition that if one respondent has brought an application under O. 18 r. 19, another respondent in the same petition cannot bring an application under O. 33 r. 2. Each respondent is free to choose under which order he intends to proceed. No respondent can dictate the type of interlocutory application to be initiated by another. The rationale of the *Alor Janggus* case is that whenever a litigant wishes to challenge the *locus* of another, that litigant will have two alternatives, either to proceed pursuant to O. 18 r. 19 or O. 33 r. 2. These alternatives are available to each and every litigant who wishes to raise the issue of *locus*.

As to the 1st respondent's argument that since the petitioners have never been the shareholders, they have no *locus* to file this petition, I find on the facts that the 1st petitioner is a beneficial shareholder and that Tuan Haji Zainal Abidin Haji Mohd Ali is indeed holding the said 51,000 shares in trust for the 1st petitioner. I am of the view that s. 181 of the Act does not state that a beneficial shareholder cannot apply to the Court under the said section. It is against the spirit and interest of s. 181 to deprive a beneficial shareholder from so applying. It could not have been the intention of Parliament to deprive a beneficial shareholder from bringing an action where a director of a company is exercising the powers of the directors and conducting the affairs of the company in a manner oppressive to the shareholders and the trustee of the said shares does not take any action to safeguard the beneficial interest of the *cestui que trust*. In *Harmer v. Amrstrong* [1934] 1 Ch D 65, 82 Lord

Hanworth MR quoted with approval the judgment of Lord Dave in *Performing Right Society Ld. v. London Theatre of Varieties Ld.* [1924] AC 1 which states:

> That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand, must in due course be made a party to the action. If this were not so the defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, or proceedings might be indefinitely and oppressively multiplied.

In the instant case the 1st petitioner has complied with the above by making Haji Zainal Abidin Haji Mohd Ali, the trustee, a party to the proceedings.

On the question of saving time and expenditure and since it is the submission of the petitioners that it is the 1st respondent who has caused the affairs of the 4th, 5th, 6th and 7th respondents to be conducted and the powers of the directors to be exercised in a manner oppressive to the said petitioners, I can do no better than to rely on *Federal Insurance Co. v. Nakano Singapore Pte Ltd.* [1992] 1 SLR 390 where the Singapore Court of Appeal said:

> Taking all the points made by Counsel for the appellants, we may state as a general rule that the Court will not exercise its power under O. 33 r. 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the court to exercise in the circumstances of each case, bearing in mind that 'Preliminary points of law too often are treacherous short cuts. Their price can be ... delay, anxiety and expense' (per Lord Scarman in *Tilling v. Whiteman* ([1979] 2 WLR 401) at p. 410).
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> ... But, in this case, the appellants had a counterclaim which was founded on the same averments of fact as the other defences. Therefore, whichever way the preliminary point went, the counterclaim still had to be tried. This meant that relatively little time or expense would have been saved by an order to try the preliminary issue first.

Although there is no counter-claim in this case, all allegations made against the 1st respondent arise from a series of transactions and averment of facts in relation to the 4th, 5th, 6th and 7th respondents. I find that the subject matter is so interrelated that it would be a wrong exercise of my discretion to allow this application. In fact in *Radstock Co-operative Industrial Society Ltd v. Norton-Radstock Urban District Council* [1968] Ch D 605, 624 CA Harmahjn LJ said:

> This is not a *preliminary* point at all. It deals with the whole subject-matter of the action, and without any evidence, and the Court is left in a most unsatisfactory position and has to guess at many things which, on a hearing, would be properly proved in evidence.

Then again at p. 632 Russell LJ had this to say:

> ... Any preliminary issue which falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them;

I find that in the present case there are a series of transactions which are interrelated and that the whole series of facts have to be considered. I hold therefore that the case cited by the 1st respondent, i.e. the *S.I. Rajah* case is not applicable to the facts before me. In the same way the *Prudential* case referred to by the 1st respondent is also not applicable as the action before me is not a derivative action on behalf of the company. It is trite law that in a derivative action the question of *locus* can be determined.

The facts in the petition disclose that the principal action is against the 1st respondent. The petitioners and the 1st respondent are all family members and the 1st respondent is the father. The 1st respondent at all material times was a director of the 4th, 5th, 6th and 7th respondents. The allegations against the 1st respondent are all contained in a series of transactions which are all interrelated. Therefore I hold that the 5th respondent is a necessary party to the action.

I further hold that all necessary parties should be before the Court and be heard on the issue and at the end of the day, after I hear the petition on the merits, and should I decide that any party was wrongly brought in, I am at liberty to award costs to the party wrongly brought in. I therefore dismissed this application with costs.

Reported by Gan Peng Chiang